Public Prosecutor v Mohd Nor Riza bin Mat Tahar

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–126 OF 2008(N)
NIK HASHIM, AUGUSTINE PAUL AND HASHIM YUSOFF FCJJ
26 MAY 2009

Criminal Law — Penal Code — s 302 — Defence — Defence of intoxication — Whether established — Whether self induced intoxication a defence — Penal Code s 85(a)

Criminal Law — Penal Code — s 302 — Murder — Whether case proven beyond reasonable doubt — Whether cumulative effect of evidence led to irresistible conclusion that accused caused death — Whether intention to kill manifestly portrayed by words and conduct of accused

Criminal Procedure — Appeal — Appeal against conviction — Conviction under s 302 of the Penal Code substituted with s 304 — Whether cumulative effect of evidence led to irresistible conclusion that accused caused death — Whether intention to kill established — Whether conviction under s 302 ought to be reinstated

This was an appeal by the prosecution against the decision of the Court of Appeal which had set aside the conviction and sentence of the accused/respondent under s 302 Penal Code ('Code') and substituted it with a conviction under s 304 of the Code. The main prosecution witness ('SP4') testified that the respondent told him of his intention to kill the deceased when the respondent, holding a Rambo knife went out of the prison's bachelor's barrack to confront the deceased. When SP4 followed and caught up with the respondent, he saw the respondent still holding the knife and that the deceased's shirt was full with blood. When SP4 took away the knife from the respondent, he heard the deceased asking 'why did you stab me Kuching'. 'Kuching' was the nickname given to the respondent. The defence submitted that the respondent had no intention to kill the deceased but merely to confront him so that the deceased would stop defaming him. The respondent also raised the defence of intoxication on the grounds that he had consumed a can of beer at the time of the incident.

Held, allowing the appeal:

(1) SP4's evidence was corroborated by another prison warden ('SP5') who

was in the common rest room of the bachelor's prison barrack at the material time. Upon hearing the commotion, SP5 went outside and saw SP4 holding the respondent from behind. He also saw the respondent holding a knife in his hand. SP5 then immediately ran to get help from SP7 who was at a stall just outside the prison fencing. Both of them then went to the scene whereupon SP7 saw SP6 holding the respondent who was struggling. When SP7 took custody of the respondent from SP6, the respondent was still struggling and shouting that he was satisfied because he had stabbed the deceased several times. There was no reason to doubt the evidence of SP4, SP6 and SP7 (see para 8).

(2) The respondent's intention to kill was manifestly portrayed by his own words to that effect, coupled with the inference from his conduct in running out with a knife in his hand to confront the deceased. The fact that SP4 saw the respondent with the knife still in his hand and the bloodied shirt of the deceased and that there was nobody else at the scene at the material time could only lead to one reasonable inference ie that the respondent had stabbed the deceased. This fact was further corroborated by the deceased who utterred the words 'why did you stab me Kuching?' (see para 9).

(3) Self induced intoxication is not a defence under s 85(a) of the Code. Moreover, there was no scientific evidence to support any intoxication of the respondent. The respondent knew what he was doing (see para 12).

(4) The evidence was overwhelming to support a conviction under s 302 of the Code. The Court of Appeal had erred in interfering with the finding of the trial judge (see para 15).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pendakwaan terhadap keputusan Mahkamah Rayuan yang telah mengenepikan sabitan dan hukuman tertuduh/responden di bawah s 302 Kanun Keseksaan ('Kanun') dan digantikan dengan sabitan di bawah s 304 Kanun. Saksi pendakwaan yang utama ('SP4') memberi keterangan bahawa responden memberitahu dia mengenai niatnya untuk membunuh si mati apabila responden, memegang pisau Rambo keluar daripada berek bujang penjara untuk bersemuka dengan si mati. Apabila SP4 mengikut dan dapat mengejar responden, dia nampak responden masih memegang pisau dan bahawa baju si mati berlumuran dengan darah. Apabila SP4 mengambil pisau daripada responden, dia terdengar si mati bertanya 'why did you stab me Kuching'. 'Kuching' adalah nama panggilan yang diberikan kepada responden. Pembelaan berhujah bahawa responden tidak berniat untuk membunuh si mati tetapi hanya untuk bersemuka dengannya supaya si mati berhenti memfitnah dia. Responden juga membangkitkan pembelaan kemabukan atas alasan bahawa dia minum setin bir pada masa kejadian.

Diputuskan, membenarkan rayuan:

(1) Keterangan SP4 disokong oleh warden penjara yang lain ('SP5') yang

berada di bilik rehat umum berek penjara bujang pada masa material. Apabila mendengar kekecohan, SP5 keluar dan melihat SP4 memegang responden dari belakang. Dia juga nampak responden memegang pisau di tangannya. SP5 kemudiannya berlari untuk mendapatkan pertolongan daripada SP7 yang berada di gerai di tepi luar pagar penjara. Kedua-dua mereka pergi ke tempat kejadian di mana SP7 melihat SP6 memegang responden yang sedang bergelut. Apabila SP7 berjaya mengawal responden daripada SP6, responden masih bergelut dan menjerit bahawa dia puas hati kerana menikam si mati beberapa kali. Tidak ada sebab untuk meragui keterangan SP4, SP6 dan SP7 (lihat perenggan 8).

(2) Niat responden untuk membunuh jelas digambarkan melalui perkataan-perkataannya sendiri, disertai dengan inferens tindakannya berlari dengan pisau di tangannya untuk bersemuka dengan si mati. Fakta bahawa SP4 melihat responden dengan pisau masih di tangannya dan baju berdarah si mati dan bahawa tidak ada sesiapa yang lain di tempat kejadian pada masa material hanya membawa kepada satu inferens yang munasabah iaitu responden telah menikam si mati. Fakta ini selanjutnya disokong oleh si mati yang melafazkan perkatan-perkataan 'why did you stab me Kuching?' (lihat perenggan 9).

(3) Kemabukan pada diri sendiri bukan pembelaan di bawah s 85(a) Kanun. Tambahan, tidak terdapat keterangan saintifik untuk menyokong apa-apa kemabukan responden. Responden tahu apa yang dia buat (lihat perenggan 12).

(4) Keterangan adalah jelas menyokong sabitan di bawah s 302 Kanun. Mahkamah Rayuan telah khilaf apabila campur tangan terhadap keputusan hakim perbicaraan (lihat perenggan 15).]

Notes

For cases on appeal against conviction, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 170–175.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Francis Antonysamy v Public Prosecutor [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)

Mohd Nor Riza Mat Tahar v Public Prosecutor [2009] 3 CLJ 350, CA (refd)

Legislation referred to

Penal Code ss 85, 85(a), 302, 304, 304(b)

Appeal from: Criminal Appeal No N-05–14 of 2007 (Court of Appeal, Putrajaya)

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the respondent.

Hashim Yusoff FCJ:

[1] This is an appeal by the prosecution against the decision of the Court of Appeal which had set aside the conviction and sentence of the accused/respondent under s 302 of the Penal Code and substituted it with a conviction under s 304 of the Penal Code and a sentence of ten years imprisonment. We allowed the appeal and now give our reasons.

[2] The facts of the case can be adequately found in the grounds of judgment of the Court of Appeal as reported in *Mohd Nor Riza Mat Tahar v Public Prosecutor* [2009] 3 CLJ 350.

THE APPEAL

[3] Before us, the learned DPP argued that the evidence of the main prosecution witness, Johaniza bin Atin ('SP4') need not necessarily be corroborated although there was an allegation of instigation against him by the defence. Under cross-examination, SP4 totally denied this allegation (see the appeal record at p 31). The gist of SP4's evidence is that the respondent specifically told him of his intention to kill the deceased, Mohd Isnizar bin Yup. The respondent had further expressed the same intention to SP4, when he had a Rambo knife (P5) in his hand and went out of the prison's bachelor's barrack to confront the deceased who had just arrived on his motorcycle. When SP4 followed and caught up with the appellant, he saw the respondent still holding the knife and that the deceased's shirt was full with blood. When SP4 took away the knife from the respondent, he heard the deceased asking 'why did you stab me Kuching'. 'Kuching' is the nickname given to the respondent.

[4] On this point, learned counsel for the defence submitted that the respondent had no intention to kill the deceased but merely to confront him at the suggestion of SP4 so that the deceased would stop defaming him. Also the defence of intoxication was raised by respondent by saying that just before the incident he had consumed a can of beer and was intoxicated at the time of the incident.

[5] The learned trial judge however found on the evidence tendered that the intention to kill by the respondent existed from the beginning when the respondent declared to SP4 a few times that he was not satisfied and that he wanted to kill 'Tinju' (the deceased's nickname). Even after SP4 had removed

the knife (P5) from respondent's hand, the respondent while standing near the deceased's head still said 'oh, you are still not dead?'.

[6] However on appeal, the Court of Appeal held that the learned trial judge had misdirected himself in the judicial appreciation and proper evaluation of the defence case by stating that the defence had failed to raise any reasonable doubt without assigning any valid reasons (see appeal record Vol 1 p 13 at para 25). This led to the Court of Appeal setting aside the conviction and sentence of the High Court and substituting it with a conviction for the offence of culpable homicide not amounting to murder, punishable under s 304(b) of the Penal Code and imposing a sentence of ten years imprisonment from the date of his arrest.

[7] Having heard the respective arguments, and perused the appeal record, with respect, we disagreed with the reasoning given by the Court of Appeal.

CONCLUSION

[8] We found that SP4's evidence was in fact corroborated by the evidence of another prison warden, Rahim bin Yahadi ('SP5') who happened to be in the common rest room of the bachelors prison barrack at the material time. Upon hearing the commotion, SP5 went out of the rest room and saw SP4 holding the respondent from behind. He also saw the respondent holding a knife in his hand. SP5 then immediately ran to get help from Sgt Yunus ('SP7') who was at a stall just outside the Seremban prison fencing. Both of them then went to the scene whereupon SP7 saw Sgt Zulkifli ('SP6') holding the respondent who was struggling. When SP7 took custody of the respondent from SP6, the respondent was still struggling and shouting that he was satisfied because he had stabbed the deceased several times. We found no reason to doubt the evidence of SP4, SP6 and SP7.

[9] Based on the above evidence we find that the respondent's intention to kill was manifestly portrayed by his own words to that effect, coupled with the inference from his conduct in running out with a knife in his hand to confront the deceased who had just arrived at the scene. The fact that SP4 saw the respondent with the knife still in his hand and the bloodied shirt of the deceased and that there was nobody else at the scene at the material time could only lead to one reasonable inference ie that the respondent had stabbed the deceased. This fact was further corroborated by the deceased who utterred the words 'why did you stab me Kuching?'.

[10] The evidence of the forensic consultant, Dr Sharifah Safoorah ('SP3') also corroborated SP4's evidence when she concluded that the deceased was killed as a result of a stab wound on his chest (see appeal record Vol 2 p 18 para

C) and that the wound could possibly be caused by a sharp weapon like a knife. According to SP3 the chances of survival from such a wound was very slim.

[11] On the defence of intoxication, s 85 of the Penal Code clearly spells out when intoxication could be a defence:

> if the person charged at the time of the act … complained of did not know that such act … was wrong or did not know what he was doing *and*
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act …

[12] But it is clear from the evidence adduced that it was the respondent who voluntarily consumed a can of beer just before the incident. Self induced intoxication is not a defence under s 85(a) of the Penal Code. Moreover in this instant appeal, there was no scientific evidence to support any intoxication of the respondent, having considered his conduct before and after the commission of the crime. It was obvious that the respondent knew what he was doing (see *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481).

[13] Apart from his defence of intoxication and allegation of instigation against SP4, the respondent also denied any intention to kill the deceased. He testified that he merely confronted the respondent only to get an answer from him as to why he had been bad mouthing the respondent by alleging that he had sodomised the respondent as told to him by SP4. As we had said earlier, SP4 denied this allegation against him by the respondent. At the risk of repetition, the fact that the respondent took out his own Rambo knife when he went to confront the deceased, coupled with his utterance of wanting to kill the deceased as he was not satisfied with what the deceased allegedly did in defaming him, negated the defence of not intending to kill the deceased. We therefore rejected the defence version.

[14] Although learned counsel for the respondent argued that nowhere did the trial judge give his reasons for disbelieving the defence, he however conceded that we could also reevaluate the evidence as a whole, which we did.

[15] We found the evidence available in this appeal was overwhelming to support a conviction under s 302 of the Penal Code. With respect we felt the Court of Appeal had erred in interfering with the finding of the trial judge.

[16] For the above reasons, we therefore allowed this appeal. The order of the Court of Appeal is set aside and the conviction and sentence given by the trial judge under s 302 of the Penal Code are restored.

Appeal allowed.

Reported by Kanesh Sundrum